

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of)

The Petition of the State of Ohio)
for Authority to Continue to Regulate)
Commercial Mobile Radio Services)

94-109
PR File No. 94-SP7

RECEIVED

To: The Commission

SEP 19 1994

COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mobile Telecommunication Technologies Corp. ("Mtel")^{1/}, by its attorneys, respectfully submits its comments in opposition to the statement of the Public Utilities Commission of Ohio's ("PUCO") intention to preserve its right for future rate and market entry regulation of commercial mobile services.^{2/} Mtel submits that the PUCO has without question failed to meet the burden of proof required to extend rate regulation to that portion of CMRS comprising of paging services and narrowband PCS and accordingly,

^{1/} Mtel and its subsidiaries, SkyTel Corp. ("SkyTel") and Destineer Corp. ("Destineer") are Commission licensees providing a wide range of commercial mobile radio services ("CMRS"). SkyTel Corp. holds a common carrier nationwide paging license and numerous common carrier non-network paging licenses and provides paging services on both a local and nationwide level. Destineer Corp. was awarded a Pioneer's Preference to operate an advanced Nationwide Wireless Network in the narrowband Personal Communication Service ("PCS") and was successful in obtaining two other nationwide narrowband PCS spectrum allotments at the recent auction. Destineer plans to offer its service on a local and nationwide level as well. Accordingly, Mtel is well positioned to provide the Commission with informed comment in this proceeding.

^{2/} Pursuant to the Public Notice, Report No. DA 94-876 (August 12, 1994), comments and replies to the Petition are due within 30 days of the date of public notice of the petition in the Federal Register, which was August 18, 1994 (See 59 Fed. Reg. 42595). Accordingly, these Comments are timely filed.

the PUCO petition must be denied with respect to those CMRS services.^{3/} In support, the following is shown:

**I. THE ACT AND THE COMMISSION'S RULES
SPECIFY THOSE LIMITED INSTANCES IN WHICH
A STATE MAY SUCCESSFULLY PETITION FOR
AUTHORITY TO CONTINUE REGULATION AND
WHAT SHOWING MUST BE MADE IN SUCH PETITIONS**

The Omnibus Budget Reconciliation Act of 1993 prohibits states from regulating the entry into business or the rates of any CMRS or private mobile radio service.^{4/} The preemption of state entry and rate regulation became effective on August 10, 1994; however, pursuant to Section 20.13 of the Commission's rules and Section 332(c)(3)(B) of the Communications Act adopted in the Regulatory Parity proceeding^{5/} any state that had rate regulations in effect as of June 1, 1993 that are applicable to a service that exists on that date, could up until August 10, 1994, petition the FCC for authority to continue regulation over such CMRS rates.

The FCC may grant these petitions to extend or initiate CMRS rate regulation only if a state demonstrates that: (1) market

^{3/} Mtel notes that the PUCO filing is titled as a statement; however, the Commission's rules provide only for the filing of petitions. Accordingly, Mtel treats these comments as a petition and refers to them as a petition throughout this pleading.

^{4/} See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2), 107 Stat. 312, 392 (1993) amending Section 332(c)(3) of the Communications Act.

^{5/} In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, Gen. Docket No. 93-252, FCC 94-31, 9 FCC Rcd 1411, 1501-1507, 1521-1523 (1994).

conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (2) such market conditions exist and such service is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within such state.^{6/}

With respect to petitions seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers adequately from unjust or unreasonable rates, the Commission has stated that the states must submit evidence to justify their showings.^{7/} First, Sections 20.13(b)(1) and 20.13(a)(4) of the Commission's rules require that petitions describe in detail the rules the state proposes to establish if the petition is granted. In addition, Section 20.13(a)(2) of the Commission's rules sets forth a list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine market conditions and the need for consumer protection. Examples of this evidence include the following:

- a. The number of CMRS providers in the state, the types of services offered by CMRS providers in the state, and the period of time that these providers have offered service in the state;

^{6/} See 47 USC §332(c)(3)(A) and §20.13(a)(1) of the Commission's Rules.

^{7/} Pursuant to Section 332(c)(3), any state filing a petition shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates.

- b. The number of customers of each CMRS provider in the state, trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data are unavailable, and annual revenues and rates of return for each CMRS provider;
- c. Rate information for each CMRS provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data are unavailable;
- d. An assessment of the extent to which services offered by CMRS providers the state proposes to regulate can be substituted for services offered by other carriers in the state;
- e. Opportunities for new providers to enter into the provision of competing services and an analysis of any barriers to such entry;
- f. Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anticompetitive or discriminatory practices or behavior by CMRS providers in the state;
- g. Evidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust and unreasonably discriminatory, imposed upon CMRS subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates that demonstrates the inability of the CMRS marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative; and
- h. Information regarding customer satisfaction or dissatisfaction with services offered by CMRS providers, including statistics and other information about complaint filed with the state regulatory commission.^{8/}

^{8/} 47 C.F.R. § 20.13(a)(2).

**II. THE STATE PETITION FAILED TO MEET
THE COMMISSION'S SUBSTANTIAL
BURDEN OF PROOF FOR CONTINUATION
OF RATE AND ENTRY REGULATION**

The PUCO filed a petition to preserve the rights of Ohio and to ensure on a prospective basis that neither the amended Communications Act nor the FCC's orders preempt the current limited state regulation over rates and market entry. The PUCO currently exercises jurisdiction over cellular service providers and radio common carriers; however the PUCO does not currently set rates or limit market entry. The PUCO states that it seeks to foster competition in the cellular resale market.^{9/}

In support of its petition, the PUCO provides that whether or not the FCC-mandated industry structure of only two providers per market, coupled with both current and future functional substitutes, will be sufficient to impose the degree of market discipline necessary to obviate any need for regulation remains to be seen. However this concern can only be the result of the possible lack of competition in Ohio resulting from the cellular duopoly since Ohio expressly mentions the cellular industry structure of two providers per market. Ohio does not provide any evidence which substantiates the need for rate or entry regulation for any CMRS. The showing provided by the PUCO simply cannot suffice to support an extension of rate regulation over paging and narrowband PCS. See, e.g., the Commission's Second Report and

^{9/} See, PUCO Petition at Page 1.

Order in GN Docket No. 93-252, at 1467, where, in the context of exercising forbearance authority, the Commission determined not to treat CMRS as a single market and, instead, to review each CMRS on a service-by-service basis. At the very least, the PUCO should have presented a bona fide study indicating how paging rates may be unreasonable and how there may be a lack of competition in the provision of paging services. The PUCO presents no explanation why this was not done. In the absence of such a showing, it would be contrary to the public interest to continue rate and entry regulation of these services.

In view of the above, there can be no doubt but that the PUCO has failed to meet the burden of proof required to meet the "market conditions" standard for paging and narrowband PCS. Thus, even if the Commission were to grant the PUCO petition, paging and narrowband PCS services must be exempted from any rate and entry regulation due to the PUCO's failure to submit any reasonable evidence which would support its market conditions showing for these services.

**III. PAGING AND NARROWBAND PCS ARE HIGHLY
COMPETITIVE SERVICES FOR WHICH
THERE IS NO BASIS FOR THE
CONTINUED RATE OR ENTRY REGULATION**

Both the Act and the Commission's rules expressly limit continued state rate or entry regulation to a restricted group of CMRS: those where market conditions fail to protect subscribers adequately from unjust practices or unreasonable discrimination, or where such market conditions exist and the service at issue is a

substitute for landline telephone service in a substantial portion of the market. In the case of paging and narrowband CMRS, neither of these conditions exists, and there is thus no basis for continued regulation.

The Commission has already determined that the level of competition in the CMRS marketplace is sufficient to permit the Commission to forbear from tariff regulation of CMRS, and the PUCO has not attempted to rebut that finding.^{10/} Indeed, in view of the PUCO's determination not to include any evidence with respect to paging or narrowband PCS, it must be inferred that the PUCO also believes that paging and narrowband PCS services are competitive. So the PUCO view would appear to be wholly consistent with that of all other states, since no state has presented any argument that such services are not competitive.

The paging industry is already highly competitive, as evidenced both by the high number of providers and the low rates for services available today. Competition for paging services in CMRS is increasing even more, due to the addition of private paging carriers that have recently been authorized to have exclusive use of their frequencies. The very recent allocation of spectrum for narrowband PCS is expected to heighten competition for existing

^{10/} See e.g., Second Report and order in GN Docket No. 93-252, 9 FCC Rcd 1411, 1468 (1994), where the Commission reported that, on average, paging companies face five other competitors.

paging companies, as well as to assure a competitive PCS marketplace from the inception of service.^{11/}

IV. CONCLUSION

The Petition purports to provide evidence which substantiates the need for continued rate regulation for all CMRS and meets the Commission's burden of proof threshold. However, the PUCO chose only to provide evidence for one component of CMRS and that evidence only attacked the cellular duopoly structure. More importantly, the petition was completely devoid of any argument or evidence pertaining to paging and narrowband PCS. This, in Mtel's view, is fatal to the state's request for extension of state rate regulation for CMRS and in particular paging and narrowband PCS services. The Commission placed a formidable burden of proof on the states in keeping with the Congressional intent to preempt state rate and entry regulation. In this instance, the state simply failed to meet its burden. Accordingly, Mtel urges the Commission to deny the instant Petition and exempt paging and narrowband PCS from any state rate and entry regulation.

^{11/} In the narrowband PCS context, the Commission created 26 narrowband PCS licenses (eleven nationwide, six regional, seven MTA-based and two local BTA-based licenses). Already competition is gearing up in narrowband PCS since at least six established CMRS providers will receive nationwide narrowband PCS licenses. See Public Notice of August 17, 1994, Report No. PCS-NB-94-1, announcing that the nationwide narrowband applications of Paging Network of Virginia, KDM Messaging Company, Destineer, Airtouch Paging, Bell South Wireless, and Pagemart II, Inc. had been accepted for filing.

For all of the above reasons, Mtel urges the Commission not to grant the subject petition.

Respectfully submitted,

**MOBILE TELECOMMUNICATION
TECHNOLOGIES CORP.**

By: 

Thomas Gutierrez
J. Justin McClure

Its Attorneys

Lukas, McGowan, Nace &
Gutierrez, Chartered
1111 Nineteenth Street, N.W.,
Suite 1200
Washington, D.C. 20036
(202) 857-3500

September 19, 1994

CERTIFICATE OF SERVICE

I, Catherine M. Seymour, a secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 19th day of September, 1994, sent by first class U.S. mail copies of the foregoing "COMMENTS OF MOBILE TELECOMMUNICATION TECHNOLOGIES CORP." to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554


Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

David Furth, Acting Chief
Rules Branch
Private Radio Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554

James B. Gainer
Steven T. Nourse
Counsel for the Public Utilities
Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793


Catherine M. Seymour